

NOTICE

*Memorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding precedent for any proposition of law.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

AARON LEDLOW,	)	
	)	
Appellant,	)	Court of Appeals No. A-10033
	)	Trial Court No. 4BE-06-773 CR
v.	)	
	)	
STATE OF ALASKA,	)	<u>MEMORANDUM OPINION</u>
	)	
Appellee.	)	<u>AND JUDGMENT</u>
_____	)	No. 5499 — July 22, 2009

Appeal from the Superior Court, Fourth Judicial District, Bethel, Peter G. Ashman, Judge pro tem, and Marvin Hamilton III, Judge.

Appearances: Margi Mock, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Talis J. Colberg, Attorney General, Juneau, for Appellee.

Before: Coats, Chief Judge, and Mannheimer and Bolger, Judges.

BOLGER, Judge.

Alaska State Trooper Garrett Willis obtained a search warrant to search Aaron Ledlow's luggage for alcohol and drugs after Aaron and his father, Larry Ledlow, arrived on a flight to the village of St. Mary's. The warrant was based on anonymous complaints against Aaron's father, Larry Ledlow, and two marijuana pipes the trooper

found in Larry's pocket. Aaron was traveling with false identification, but the trooper had no information linking Aaron to the importation of alcohol and drugs. We therefore conclude that the warrant was not supported by probable cause that Aaron would be carrying contraband in his luggage. But we must remand for further proceedings because Ledlow improperly appealed from a plea of no contest, reserving an issue that was not completely dispositive.

### ***Background***

According to the affidavit submitted in support of the search warrant, the Alaska State Troopers received numerous anonymous complaints that Larry Ledlow would be transporting alcohol and illegal drugs to the village of St. Mary's. Following up on these complaints, Trooper Willis met Larry Ledlow and his son, Aaron Ledlow, after they arrived at St. Mary's on a Frontier Flying Service flight. Willis eventually arrested both Ledlows for providing false information to a police officer and seized their luggage as evidence.

The trooper then submitted a short affidavit to Magistrate Renea M. Hootch in support of his application to search the luggage.

The affidavit summarizes Willis's investigation up to that point:

2. Alaska State Troopers have received numerous complaints that Larry Ledlow would be traveling to St. Mary's and will be transporting Alcohol and Drugs. Attempts have been made to contact Larry that [have been] met with negative results. AST also learned that Larry may be using an alias to get on the flight.

3. On 6/2/06 at 1945 hours, your affiant observed Larry Ledlow and his son Aaron Ledlow exit the [F]rontier [F]lying aircraft. Trooper Willis made contact with Larry[] and Aaron who advised Trooper Willis the[ir] names were CeCe M.

Younger with a DOB of 2/4/32, and Aaron stated his name was Mike Ramon with DOB of 1/8/80[.] [B]oth produced photo ID with those names and DOB on it. Both ID's stated that they were employees for the State of Alaska Department of Transportation. Both were asked by Trooper Willis for other photo ID and they advised they did not have any. They were then placed under arrest for Providing False Information to a Police Office[r]. After then placing them under arrest, Trooper Willis asked them for other photo ID's [and] they produced their [Alaska driver's licenses]. These ID's indicated in fact they were Larry and Aaron Ledlow. Trooper Willis advised Larry of the complaints AST has been receiv[ing], and Larry advised Troopers to get a search warrant to search his luggage. Trooper Willis was advised th[e] same by Aaron. The luggage was seized that displayed the names CeCe Younger and Mike Ramon that both Larry and Aaron used when contacted by AST. After Larry was placed under arrest, a search incident to arrest by Trooper Willis found two glass pipes [commonly] used to smoke marijuana in a paper bag found in Larry Ledlow's right jacket pocket.

Based on this affidavit, Magistrate Hootch issued a search warrant authorizing the trooper to search the Ledlows' two backpacks and six items of checked luggage.

The trooper seized the following items from Larry Ledlow's luggage: twelve metal marijuana pipes, seven glass marijuana pipes, one gallon of alcohol, \$3,015 in cash, and five gallon-sized bags of marijuana. The trooper also seized the following items from Aaron Ledlow's luggage: two digital scales, one gallon of alcohol, three gallon-sized bags of marijuana, and a box containing ingredients to make home brew.

Aaron Ledlow was originally charged with two counts of misconduct involving a controlled substance in the fourth degree<sup>1</sup> and one count of liquor importation

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<sup>1</sup> Former AS 11.71.040(a)(2) & (a)(3)(f) (2006).

into a local option area.<sup>2</sup> Aaron made a motion to suppress the evidence obtained on the basis of the search warrant, but the superior court denied the motion after hearing testimony from Trooper Willis and Larry Ledlow. Aaron eventually entered a plea of no contest to one count of misconduct involving a controlled substance in the fourth degree, preserving his right to appeal on the basis that the affidavit supporting the search warrant did not establish probable cause to believe that there was contraband in his luggage.<sup>3</sup>

***Trooper Willis's Affidavit Does Not Establish Probable Cause That Aaron Ledlow Had Contraband in His Luggage.***

When a search warrant is based on an affidavit, the probable cause for the warrant must be shown within the “four corners” of the affidavit.<sup>4</sup> “Probable cause . . . exists when ‘reliable information is set forth in sufficient detail to warrant a reasonably prudent [person] in believing that a crime has been or was being committed.’”<sup>5</sup>

In addition, when a search warrant application relies on the statements of an anonymous informant, the government must establish that the tip is based on personal knowledge and that the informant is a credible person.<sup>6</sup> Credibility may be established by showing that the informant is a trustworthy person, or by showing that the informant’s information has been independently corroborated.<sup>7</sup>

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<sup>2</sup> AS 04.11.499(a).

<sup>3</sup> See *Cooksey v. State*, 524 P.2d 1251, 1256-57 (Alaska 1974).

<sup>4</sup> See *State v. White*, 707 P.2d 271, 277 (Alaska App. 1985).

<sup>5</sup> *Van Buren v. State*, 823 P.2d 1258, 1261 (Alaska App. 1992) (quoting *Harrelson v. State*, 516 P.2d 390, 396 (Alaska 1973)).

<sup>6</sup> See *State v. Jones*, 706 P.2d 317, 323-25 (Alaska 1985).

<sup>7</sup> See *Hugo v. State*, 900 P.2d 1199, 1201 (Alaska App. 1995).

The government may show that an informant is a trustworthy person by showing that the informant is a good citizen informant who is helping the police out of concern for society or personal safety.<sup>8</sup> The government is not required to show additional credibility for a citizen informant.<sup>9</sup> In this case, the superior court judge concluded that Willis received numerous complaints from citizen informants. But there is no evidence in the affidavit to support this conclusion; Willis's testimony confirmed that the tips were given anonymously.

The government may also establish that an informant is credible by corroborating significant details from the informant's tip.<sup>10</sup> In the present case, the superior court concluded that the troopers had received anonymous complaints that Larry Ledlow would be traveling under an alias, and that this information was corroborated when Trooper Willis found that the Ledlows were using false identification after they exited the plane. But this conclusion was mistaken because the affidavit was ambiguous about the true source of the trooper's knowledge that Larry would be using an alias.

The affidavit simply stated: "AST also learned that Larry may be using an alias to get on the flight." The affidavit did not say that this information came from the anonymous complaints. Testifying at the evidentiary hearing, Willis explained how he believed that Larry would be using an alias because an airline employee could not find Larry on the flight's manifest. Willis therefore did not corroborate the anonymous complaints when he found that the Ledlows were using false identification because that information was not part of the complaints.

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<sup>8</sup> See *Hodsdon v. State*, 698 P.2d 1224, 1227 (Alaska App. 1985).

<sup>9</sup> *Id.*

<sup>10</sup> See *Landon v. State*, 941 P.2d 186, 191 (Alaska App. 1997).

Thus, the anonymous complaints that formed the basis for Willis’s affidavit only stated that Larry Ledlow would be flying into St. Mary’s with alcohol and drugs. There is no evidence in the affidavit establishing that the tips were based on personal knowledge or that the informants were credible. Without more, these tips do not establish probable cause that could support a search of Aaron Ledlow’s luggage. We therefore review the balance of the affidavit to determine whether the warrant was properly supported.

The affidavit states that Willis found two “glass pipes [commonly] used to smoke marijuana . . . in Larry Ledlow’s right jacket pocket.” These pipes may have suggested that Larry was carrying marijuana on his person.<sup>11</sup> But the value of this suggestion is tempered by the fact that the right to privacy under the Alaska Constitution protects possession of marijuana for personal use in one’s home.<sup>12</sup> Accordingly, “no search warrant can issue for evidence of marijuana possession unless the State affirmatively establishes probable cause to believe that the type of marijuana possession at issue in that case is something other than the type of possession protected under *Ravin v. State*.”<sup>13</sup>

Because Larry Ledlow resides in St. Mary’s, there is a substantial possibility that he was carrying the marijuana pipes for personal use in his home — use that would be protected by his right to privacy. In other words, the discovery of the two pipes on Larry’s person did not substantially increase the probability that Larry was importing drugs and alcohol for sale.

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<sup>11</sup> *Cf. Dollison v. State*, 5 P.3d 244, 246-47 (Alaska App. 2000) (holding that possession of a cocaine pipe established probable cause that suspect also possessed crack cocaine on his person); *Snider v. State*, 958 P.2d 1114, 1116-18 (Alaska App. 1998)

<sup>12</sup> *See Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975); *Noy v. State*, 83 P.3d 538, 541 (Alaska App. 2003).

<sup>13</sup> *State v. Crocker*, 97 P.3d 93, 96 (Alaska App. 2004).

In addition, the marijuana pipes were found on *Larry* Ledlow's person, not Aaron's. Generally "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."<sup>14</sup> Under this principle, the discovery of the marijuana pipes in Larry's pocket could not establish a reasonable probability that Aaron Ledlow would have alcohol and drugs in his luggage.

The affidavit also stated that Aaron Ledlow used false identification when he flew to St. Mary's and when he was first confronted by Trooper Willis. Police may reasonably suspect that a person traveling under an alias may be involved in criminal activity.<sup>15</sup> But merely traveling under an alias does not establish probable cause that the suspect is committing a particular crime.<sup>16</sup> In this case, Aaron's false identification only justified a reasonable suspicion of criminal conduct; it did not establish probable cause that he would be importing alcohol and drugs.

We recognize that we have to read Trooper Willis's affidavit in its entirety rather than dissecting it into isolated bits of information.<sup>17</sup> But the primary incriminating details in the affidavit were the complaints against Larry Ledlow and the marijuana pipes found in Larry's pocket. There was no similar information tying Aaron to the importation

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<sup>14</sup> *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 342, 62 L. Ed. 2d 238 (1979).

<sup>15</sup> *See United States v. Sokolow*, 490 U.S. 1, 8-9, 109 S. Ct. 1581, 1586, 104 L. Ed. 2d 1 (1989); *LeMense v. State*, 754 P.2d 268, 273 (Alaska App. 1988).

<sup>16</sup> *See United States v. Dimick*, 990 F.2d 1164, 1166 (10th Cir. 1993), *rev on other grounds, United States v. Little*, 18 F.3d 1499, 1504 (10th Cir. 1994); *United States v. Moore*, 483 F.2d 1361, 1362-63 (9th Cir. 1973); *Murphy v. State*, 496 S.E.2d 512, 515 (Ga. App. 1998).

<sup>17</sup> *See, e.g., State v. Koen*, 152 P.3d 1148, 1149 (Alaska 2007).

of drugs and alcohol. The warrant thus appears to require piling “bricks of speculation” against Aaron Ledlow, without the “mortar of factual detail to bind them.”<sup>18</sup>

***The Issue in This Appeal Is Not Dispositive.***

As noted above, Aaron Ledlow pleaded no contest to fourth-degree misconduct involving a controlled substance, reserving his right to appeal based on the procedure approved in *Cooksey v. State*.<sup>19</sup> But we are not allowed to approve a *Cooksey* appeal unless our resolution of the issue preserved for appeal will be dispositive of the entire case.<sup>20</sup> An issue is not “dispositive” unless “resolution of the issue in the defendant’s favor would either legally preclude the government from pursuing the prosecution or would leave the government without sufficient evidence to survive a motion for judgement of acquittal at the conclusion of the government’s case.”<sup>21</sup> We conclude that the issue raised in Aaron Ledlow’s appeal is not dispositive because there remains substantial admissible evidence that the State could rely on to avoid a judgment of acquittal.

Our foregoing decision determines that there was no probable cause supporting the search warrant for Aaron Ledlow’s luggage. But this decision does not affect the admissibility of the evidence discovered during the search of Larry Ledlow’s luggage. As noted above, Larry Ledlow’s luggage contained a gallon of alcohol and five gallon-sized bags of marijuana. Furthermore, this decision does not affect the evidence that Aaron Ledlow was traveling with his father and both were using false identification.

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<sup>18</sup> See *Carter v. State*, 910 P.2d 619, 625 (Alaska App. 1996).

<sup>19</sup> 524 P.2d at 1256-57.

<sup>20</sup> See *Oveson v. Anchorage*, 574 P.2d 801, 803 n.4 (Alaska 1978).

<sup>21</sup> *Miles v. State*, 825 P.2d 904, 906 (Alaska App. 1992).



Such evidence appears sufficient to withstand a motion for judgment of acquittal on the felony charges lodged against Aaron Ledlow (or complicity in the charges against his father).<sup>22</sup>

We have the discretion to circumvent this problem by treating this invalid *Cooksey* appeal as a petition for review and then granting the petition.<sup>23</sup> Under the circumstances of this case, we have decided that we should grant Ledlow's petition for review and make the decision outlined above. The issue has been fully briefed, the critical portion of the record is a short affidavit, and it appears to us that this procedure will advance the litigation in this case.<sup>24</sup> On remand, Ledlow must be allowed the opportunity to withdraw his plea and go to trial if he so chooses, with all previous counts reinstated.<sup>25</sup>

### ***Conclusion***

Trooper Willis's affidavit did not contain sufficient details to warrant a finding of probable cause to search Aaron Ledlow's luggage. We therefore REVERSE the judgment of the superior court and REMAND for further proceedings.

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<sup>22</sup> See *Baker v. State*, 905 P.2d 479, 487 (Alaska App. 1995) (“[W]hen an indictment alleges that the defendant personally committed the acts constituting the crime, the defendant is on notice that he or she may also be convicted under a theory of accomplice liability. . .”).

<sup>23</sup> *Clark v. Anchorage*, 2 P.3d 639, 643 (Alaska App. 2000).

<sup>24</sup> See *Wilburn v. State*, 816 P.2d 907, 910 (Alaska App. 1991).

<sup>25</sup> Cf. *Ritter v. State*, 16 P.3d 191, 196 (Alaska App. 2001) (mandating the reinstatement of counts dismissed as part of an invalid *Cooksey* plea agreement).